IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.416 OF 2006

IN

NOTICE OF MOTION NO.268 OF 2006

IN

BCCC SC SUIT NO.290 OF 2006

WITH

CIVIL APPLICATION NO.504 OF 2006

Paras Associates & Ors. ...Appellants

Versus

Devji Shamji Patel & Anr. ...Respondents

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Mr.V.A.Thorat, Sr.Counsel with Mr.T.N.Subramaniam and Mr.B.D.Joshi for Appellants.

Dr.Virendra Tulzapurkar with Mr.R.D.Soni i/b M/s.Ram & Co. for Respondents.

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CORAM: A.M.KHANWILKAR, J.

JULY 26, 2006.

P.C.

1. Heard counsel for the parties. Perused the relevant documents on record.

2. I find no infirmity in the opinion recorded by the Court below while dismissing the Notice of Motion taken out by the Appellants for interim relief during the pendency of the Suit. This is so because the Plaintiffs approached the Court with specific case as set out in Paragraphs 5 and 11 of the Plaint, which read thus:

> "5. The Plaintiffs say that the Defendant No.1 as the owner was interested in developing and constructing on the suit property. The Plaintiffs say that however as they were unable to raise funds, negotiate with the tenants and get the property cleared for development and construction, they came in contact with the Plaintiffs No.2 to 8 herein to join hands with the Defendants in the development and construction on he suit property in all aspects as co-partners. The Plaintiffs further say as per the discussions and deliberations exchanged between the Plaintiffs No.2 to 8 and the Defendants inter alia at the meeting held on 25-2-2004 and with certain modifications the Defendants agreed to accept the Plaintiffs No.2 to 8 as partners because the Plaintiffs are qualified engineers, developers and architects by profession and have very good knowledge of development and construction. Accordingly an understanding was arrived at between the Plaintiffs No.2 to 8 and the Defendants herein that the suit property shall be brought into the Plaintiff No.1 firm as

the contribution of the Defendants into the said partnership and the Plaintiffs No.2 to 8 would bring in the capital as their contribution for the aid development and construction of the suit property. The Plaintiffs say that the said negotiations took place in the year 2004. The Plaintiffs will crave leave to refer to and rely upon the Minutes of the Meeting held on 25-2-2004 along with the English Translation thereof, when produced. The Plaintiffs say that after negotiations a partnership deed was entered into between the Plaintiffs No.2 to 8 and the Defendants in the name and style of Plaintiff No.1 on 18th February, 2004. The Plaintiffs say that the said partnership deed dated 18th February, 2004 is registered with the Registrar of Firms. Hereto annexed and marked Exhibit "A" is a copy of the said partnership deed dated 18th February, 2004. The Plaintiffs say that as advised by the Chartered Accountants of the Defendants it was decided that the said property is brought into the partnership as contribution of the Defendants but would not be mentioned and nothing about the suit property will be mentioned in the said partnership deed, though it was understood that the said suit property shall form an asset of the Partnership and would be developed jointly by the Plaintiffs and the Defendants as partners. As such the said partnership deed is silent inn regard to the assets of the partnership firm."

"11. The Plaintiffs say that therefore they addressed a letter dated 16th November 2005 to the Defendants recording all the above facts and recording the amount contributed by the Plaintiffs No.2 to 8 and calling upon the Defendants to confirm that the suit property is an asset of the partnership firm and to deal with the suit property as such. However, though the Defendants have received the

> said letter, they have failed and neglected to reply thereto. hereto annexed and marked EXHIBIT "D" is a copy of the said letter dated November 16, 2005."

3. In substance, the specific case made out in the Plaint is that the parties had agreed to treat the suit property which was owned by Defendant No.1 as having been brought as capital by the Defendant No.1 while taking him as one of the partner of the firm. There is substance in the stand taken by the Respondents that the case made out in the Plaint is belied by the very documents pressed into service by the Plaintiffs themselves. In that, the receipt of payment of part consideration dated 1st October 2005 clearly specifies that the payment of Rs.14,00,000/- (Rupees Fourteen Lakhs) was made to Defendant No.1 on account of land transaction. Similarly, the draft document exchanged between the parties titled as ‘Agreement for Development-cum-Sale’ also supports the position of the Respondents that the partnership firm was to be given right to develop the said property and also in the nature of sale of that property.

4. I find substance in the argument of the Respondents that if the property was brought as capital by Defendant No.1 in the partnership firm, there was no reason for payment of consideration towards land price as has been paid and mentioned in the receipt/confirmation dated 1st October 2005. I am in agreement with the opinion expressed by the lower Court which has taken the totality of the circumstances into account to hold that it is not possible to accept the case of the Plaintiffs that the suit property has been brought as capital by the Defendant No.1 in the partnership business. For, it appears that the transaction between the parties relating to the suit property was one of Development-cum-Sale transaction. If it is so, no fault can be found with the opinion expressed by the lower Court that in such a situation the remedy available to the Plaintiffs is to file suit for specific performance. What is relevant to note is that in the suit as filed, there is no prayer for declaration that the suit property has been brought in as capital by the Defendant No.1 in the partnership business. This relief becomes

imperative as the documents on record which are pressed into service by the Plaintiffs as has been rightly found by the lower Court, indicate to the contrary. In such a situation, it was necessary for the Plaintiffs to seek such declaration. In absence of such declaration, the simplicitor relief of injunction as prayed in the suit cannot be considered.

5. Counsel for the Respondents has relied on decision of the Apex Court in the case of **Wander Ltd. & Anr. vs. Antox India P.Ltd. reported in 1990 (Supp) SCC 727**, in particular, Para 14 thereof, which refers to the scope of interference in the Appeal from Order such as the one filed before this Court.

6. At this stage, Counsel for the Appellants submits that the Appellants be permitted to withdraw this Appeal with liberty to take recourse to such other appropriate remedy as may be permissible by law including to amend the present Plaint and ask for further reliefs; and till such time, the status-quo as maintained by the parties,

ought to continue.

7. As the lower Court has also found that the Appellants/Plaintiffs have spent substantial amount towards the transaction in question, it will be in the interest of justice to grant this limited protection to Appellants to enable them to take recourse to such remedy as may be permissible by law, including of amendment of subject Plaint, as may be advised. Such application if made, will have to be considered on its own merits in accordance with law. This liberty may not be construed as an opinion on the permissibility or otherwise of proposed relief or proceedings. Instead, the Court will have to to consider the said application on its own merits. Parties are directed to maintain status-quo for a period of four weeks from today.

8. It will also be open to the Appellants to seek such interim relief in the proposed proceedings as may be advised, which will be considered on its own merits.

9. Appeal and the Civil Application disposed of on the above terms.

A.M.KHANWILKAR, J.